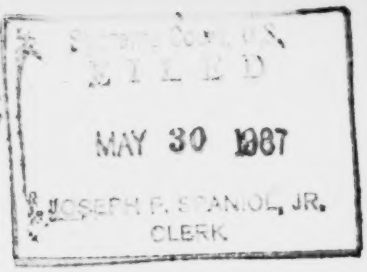
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NUMBER_____



IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1986

JIMMIE ARNOLD BRUMFIELD II, Petitioner

v

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a Federal Court of Appeals in proceedings arising under 28 U.S.C. 2255 have a duty to determine whether or not Federal Constitutional error involving a denial of rights guaranteed by the Sixth Amendment was harmless beyond a reasonable doubt in order to allow the decision of the lower court committing the Constitutional error to stand?

2. Does a Federal Court of Appeals in proceedings arising under 28 U.S.C. 2255 have a duty to reverse a conviction when the trial court is shown to have been consciously or subconsciously biased against the Defendant before and during the trial of the matter contrary to the due process requirements of the Fifth Amendment of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings are the Petitioner, Jimmie Arnold Brumfield II and the United States of America.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

JIMMIE ARNOLD BRUMFIELD II, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Jimmie Arnold Brumfield II, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on January 6, 1987 (Rehearing denied February 2, 1987).

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported and is

reprinted in the Appendix filed with the court, Page 196.

The Decision of the United States District Court for the Western District of Louisiana, Shreveport Division, has not been reported. The transcript thereof is reprinted in the Appendix filed with the court, Page 1.

JURISDICTION

Invoking Federal jurisdiction under 28 U.S.C. 2255, the petitioner filed a Petition in the Western District of Louisiana, Shreveport Division, seeking relief. On the 6th day of August, 1986, the District Court entered its order dismissing the Petition. See Appendix, Page 166.

On petitioner's Appeal the Fifth Circuit on January 6, 1987 entered a Judgment and an Opinion affirming the District Court orders finding neither clearly erroneously finding of fact or error of law. Petitioner's

Petition For Rehearing was denied February 2, 1987.

On April 20, 1987, Justice Byron R. White ordered that the time for filing this Petition For Writ Of Certiorari be extended to and including June 2, 1987.

The jurisdiction of this court to review the Judgment of the Fifth Circuit is invoked under 28 U.S.C. Section 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the ccurt shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of

law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (As amended May 24, 1949, c.139, s 114, 63 Stat. 105.)

STATEMENT OF THE CASE

In 1980, petitioner was a practicing lawyer admitted to the Bar of the State of Louisiana. In October of 1980, petitioner traveled to the state of Florida for the

purpose of initiating representation of one Garvin Dale White who was then in Federal custody. While in Florida, petitioner met Randy Costales, a friend or associate of White.

White was transported to Shreveport, Louisiana and incarcerated in the Shreveport jail.

Petitioner returned to the Shreveport area and commenced a series of meetings with Mr. White and Mr. Hawkins, a Senior Agent with the Drug Enforcement Administration, and Agents from other agencies in an effort to negotiate a satisfactory resolution of various charges pending against Mr. White.

These negotiations necessitated a number of meetings with Mr. White in the jail in Shreveport.

Mr. Costales came to the Shreveport area and stayed at the law office of Petitioner. While in Shreveport, Mr. Costales visited Mr.

White in the Shreveport jail on one occasion. He also accompanied Petitioner on a social trip in the family Lincoln Continental which was later to play a part in the escape of Mr. White from the Shreveport jail on November 1, 1980.

Mr. White escaped from the Shreveport jail in the evening of November 1, 1980, shortly after Petitioner was logged into the jail by a Mr. Blake. Present in the same area were two other individuals, Mr. Jenkins and Barbara Dickerson.

Petitioner went to the desk area as Mr. Jenkins started toward the jail cell to get Mr. White. Petitioner dialed his wife, who was also a practicing attorney, and asked Barbara Dickerson, a jailer, to get on the phone to discuss a succession problem. Barbara Dickerson had previously requested advice from Mrs. Brumfield on this problem. Jenkins asked Petitioner if he wanted to see

Snyder, and Petitioner said, "Yes, if he wants to see me." or words to that effect.

Petitioner left the booking area, and White apparently walked out of the jail cell, went down the elevator to the first floor of the jail and into the parking lot, where he recognized a pickup truck he claimed he bought for his girlfriend. The pickup truck was being used by Petitioner at that time for his personal transportation with the knowledge and permission of White.

White proceeded to drive around the area and ultimately located Petitioner's law office which was directly across the street from the Petitioner's residence.

White apparently found what he needed and left the area in the Lincoln Continental which was the family automobile of Petitioner. The pickup truck was left at the family residence.

White testified that he proceeded toward Little Rock, Arkansas and along the route called for assistance.

White claimed that the escape was unplanned and that he took advantage of a fortuitous opportunity to walk from the building. In support of White's contention it is to be noted that there was absolutely no direct evidence or testimony that would establish a conspiracy, or plan as found by the Court.

In the meantime, Petitioner was informed of the escape, and at first assumed Jenkins was kidding him. When he became convinced that Jenkins was telling the truth, he remained at the jail for the purpose of giving a statement to the authorities.

After a lapse of time, Petitioner went outside, discovered the pickup truck was missing and went in to the jail to report the vehicle as stolen. He then called his wife

who came to pick him up, driving the pickup in question.

Later that evening, both Petitioner and his wife were placed in custody and subsequently released.

Approximately one year later White was arrested and returned to custody.

White was charged with escape and was tried and convicted of that charge. He was represented by Petitioner in that proceeding.

Snyder had been charged with conspiracy in the escape of White prior to the recapture of White.

Petitioner and Costales were charged with conspiracy in the escape of White and in aiding and abetting the escape of White subsequent to White's conviction of escape.

The court tried Snyder in a bench trial and found him guilty of conspiracy in June of 1982.

Having tried White and then Snyder, two days after the conclusion of the Snyder trial the court commenced a bench trial of the Petitioner.

The trial of the matter then moved forward with a hidden agenda which was probably not consciously known to the trial court but which agenda unfolded with dramatic surprise at the time of pronouncement of the decision.

The hidden agenda referred to was the use of evidence and facts found in the Snyder trial in making the decision in Petitioner's trial.

The reputation of the trial Judge requires that Petitioner make clear to this Court that such agenda was not created in a willful manner, but probably resulted from the feeling of the Court that he could judge Petitioner's case in a vacuum, as it were, without having the Court's previous thoughts

and findings impact on his thinking. The Court's known integrity and personal feelings on questions of judicial integrity are strong, and therefore the court undoubtedly unwittingly allowed itself to be led down the primrose path of Constitutional error in this matter.

Whether willful or unwillful, conscious or subconscious, the hidden agenda plagues us today just as it did in the courtroom, leaving serious Constitutional and procedural questions unresolved in its wake.

The importance of the Court's reliance upon Snyder cannot be overemphasized. The evidence against the Petitioner was virtually all circumstantial, and the Court itself said in its opinion "every bit of information, much of it circumstantial, had to fit or he (Petitioner) is not guilty." Appendix, Page 1, 41.

That much of the evidence did not fit will be discussed further as argument under REASONS FOR GRANTING THE WRIT.

Petitioner filed a Motion under 28 U.S.C. 2255 in the same district wherein Petitioner had previously been convicted.

Among the numerous legal and factual issues raised in the Motion (which included a serious challenge to the sufficiency of the evidence) are two of critical import before this Court:

A. Was the trial court biased and,

B. Were Petitioner's Constitutional rights violated by the original proceedings?

Analyzing the allegation of bias (a denial of Fifth Amendment due process) and the Constitutional questions involving the right to confront and cross-examine witnesses guaranteed by Amendment VI of the United States Constitution of necessity requires a

substantial review of the evidence, its sufficiency and inconsistency.

Judge Tom Stagg denied Petitioner relief on the 2255 Motion, which Order of denial was appealed to the Court of Appeals for the Fifth Circuit which denied Petitioner relief, claiming that the error was harmless. Appendix Page 196.

The Court of Appeals further held that taking notice of evidence presented in the Snyder case was error. Appendix Page 196.

In so doing, the Court of Appeals did not specify the legal basis for the error, perhaps feeling that the error was so apparent that further comment was not necessary.

Petitioner will argue that

A. The legal basis for the error is Constitutional, because Petitioner's rights under the Fifth and Sixth Amendments of the United

States Constitution have been violated; and,

B. The Constitutional violation controls the standard of review to be applied.

In summary fashion in its opinion, the Court of Appeals disposed of Petitioner's claim that bias on the part of the trial court violated Petitioner's Fifth Amendment Constitutional rights (due process), in effect finding no bias existed.

Contrary to the clear mandates of this Court regarding Constitutional error, the Court of Appeals passed over the question and applied the standard of review applicable to non-Constitutional error to determine whether or not the error found by the Court of Appeals to exist required reversal of Petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I.

The burden is upon the Respondent to prove beyond a reasonable doubt that Federal Constitutional error was harmless error and did not result in reversible error.

The Court of Appeals in its unpublished opinion (Appendix, Page 196) makes the following statement:

> "Twice during the 41 pages of his findings of fact the trial judge referred to facts established in the prior Snyder trial. This was error. However, to obtain habeas relief Brumfield must show that the judge relied on the challenged facts and that this evidence caused actual prejudice. United States v.

Frady, 456 U.S. 152 (1982).

(emphasis added)

Appendix, 196, 208"

The Court of Appeals in following Frady Supra placed its ruling in direct conflict with the holdings of this court related to the standards to used in judging whether or not Federal Constitutional error resulted in reversible error.

The references to the Snyder trial apparently referred to by the Court of Appeals are the following:

> "It's also true that Mr. Donald E. Snyder, who was tried in this Courtroom on Monday and Tuesday of last week or Tuesday and Wednesday, rather, of last week, was the cellmate of Mr. White at the time of the escape and he was convicted by this Court on charges that he was involved in the conspiracy and

abetting and assisting in the escape of Mr. White."

Appendix Page 1, 5

And:

"I found as a fact in his trial that he was in his undershorts because it was a part of a scheme to delay the jailer at the jail cell door, and he was convicted on those facts. And those facts have not changed since Tuesday's trial of last week until this week's trial."

Appendix 1, 25

Neither Petitioner nor Petitioner's attorney had any advance warning of the intention to rely upon facts developed and found in the Snyder trial in its decision in Petitioner's trial. Who is to say that cross-examination of the same witnesses from Petitioner's perspective would not have

resulted in a different conclusion by the court?

The right to confront witnesses is guaranteed by Amendment VI to the United States Constitution which states in part:

> "In all criminal prosecutions the accused shall enjoy the right. . .; to be confronted with the witnesses against him." U. S. Constitution, Amendment VI.

Clearly, Petitioner's Constitutional rights in this regard were summarily denied in the determination of Petitioner's case.

The standard in determining reversible error is not that Petitioner show the evidence caused actual prejudice Frady supra because clearly the Judge relied on the Snyder facts, but a far stricter standard which shifts the burden to the respondent to show beyond a reasonable doubt that the error was harmless error.

The Petitioner respectfully submits to this court that the proper standard in evaluating the evidence to sustain this conviction was not followed and that the standard which should have been followed has recent statement in the case of Fahy v. Connecticut, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229, and a more recent discussion in Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, in which case the Court determined that there could be harmless Constitutional error. 375 U.S. 18, 23, 17 L.Ed.2d 705, ____, 87 S.Ct. 824, 827, establishing as the minimum standard for determining whether or not the Constitutional error required reversal as follows:

> "...we hold, as we now do, that before a federal Constitutional error can be held harmless, the court must be able to declare a

belief that it was harmless beyond a reasonable doubt."

Chapman v. California, 386 U.S. 18,24.

This Court further amplified its position stating:

"Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. 18, 24.

As previously stated, the Court of Appeals in its opinion refers to two references to the Snyder; and Petitioner has reproduced supra Page 19 those portions of the opinion to which the Court of Appeals apparently made reference.

Reading the opinion of the trial court(Appendix Page 1) reveals references to

the Snyder trial on Appendix Page 5 and Appendix Page 25. References to the findings in Snyder are to be found in the Appendix Page 56 and Page 58. The word Snyder or references to Snyder appear in the court's opinion a total of twenty-one (21) additional times. The importance of Snyder is therefore clear and may well have controlled the court in the case of Petitioner.

It is respectfully submitted that the respondent cannot show beyond a reasonable doubt that the notice of the Snyder trial was harmless error.

II.

Bias on the part of the trial court can be demonstrated violating Petitioner's right to due process under the Fifth Amendment and mandates the reversal of Petitioner's conviction.

Chapman supra in following Fahy supra leaves standing certain Constitutional errors which require reversal, among them trial by a Judge who is not impartial. In this regard the in Chapman the Court stated:

> "Although our prior cases have indicated that there are some Constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,[8] this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. (emphasis supplied)
>
> 386 U.S. 18, 23

including by reference in Note 8, the mandatory reversal when the trial was conducted by an impartial judge. (Citing Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437) 386 U.S. 18, 23.

While Tumey does not refer to Amendment V of the United States Constitution, it does involve due process and is consistent with the Fifth Amendment due process requirement.

Judge Stagg in his opinion cites United States v. Richards and quotes therefrom:

> "Because no one has a window to a man's mind, knowledge must often be proved by indirect evidence."

Usually the same can be said of proof of individual bias, for certainly proof of bias requires proof of an individual's state of mind. Unintended or subconscious bias because of the inherent subtlety thereof is probably harder to prove or perceive than overt bias, because the person who is so biased does not recognize the existence thereof.

The proof of bias in this case is to be discovered within the framework of the opinion of the Court. The proof starts with

the statements of the roots of bias by the Court and reaches its crescendo later in the opinion. Interwoven into the fabric of the opinion are comments and decisions which develop and support this unfortunate theme.

The statement of the roots of bias are set forth in the opinion:

> "It's also true that Mr. Donald E. Snyder, who was tried in this Courtroom on Monday and Tuesday of last week or rather Tuesday and Wednesday, rather, of last week...was convicted by this Court on charges that he was involved in the conspiracy...in the escape of White.
>
> Appendix Page 1, 5.

The Court thus was placed in the position of having to put the Snyder trial out of its mind in order to try the Petitioner without being biased or prejudiced

by Snyder. That the Court could not and did not do this is not only evidenced by references to the Snyder trial in the opinion, but booms out with resounding clarity in this statement by the Court:

> "Snyder was a co-conspirator with White and with Brumfield and part of the plan was for him to be undressed when Jenkins came to get them. The distractions I found were so effective that Jenkins was still at the door waiting for Snyder and Dickson was still on the telephone when Garvin Dale White was long gone from the police building. (emphasis supplied)
>
> Appendix Page 1, 52

Clearly Judge Stagg was referring to his findings in Snyder by the use of the past tense, and this is not a grammatical error because the court clearly reserved the right

to correct grammatical errors in the Court's opinion stating:

> "If it would be in the future necessary for this opinion to be reduced to writing, I reserve the right to edit and to use proper grammar but not to change the substance of the findings or the conclusions.
>
> Appendix, Page 1, 7

Judge Stagg did not elect to change the above remarks to the present tense, making it even more clear that the reference was to the findings in the Snyder case.

Certain remarks by the Court reflect the bias. With reference to a statement by Petitioner on the witness stand that the attempts to contact Aguilar were related to arranging a "bust in the Shreveport area," the Court replied "Horsefeathers."Appendix Page 1, 47. This remark is made with the

clear knowledge of the fact that this statement by Petitioner was substantiated in part on rebuttal by the Government when Hawkins, a key witness, admitted that attempts were being made to arrange an arrest in his area. Transcript of record, Page 659-660.

The Court by so stating gave credibility to a statement by Agent Hawkins that "he did not know what a non-tower strip was." Transcript of Record, Page 657.

Finally, the Court makes this statement:

> "It is only in conclusion that I say that the credibility choices that the court was required to make, many of them were in favor of the defendant but many of them were not."

Appendix, Page 1, 64

Obviously, a witness is either credible or not credible. How can one be credible on

one issue where credibility is critical and not credible on others?

It is difficult to analyze the foregoing statement by the Court unless one accepts as a fact that the Court had to make selective credibility decisions between Petitioner and the Government's witnesses in order to reconcile his decision in Petitioner's case with his predetermined bias and with the Snyder case.

Reconciling the evidence in Petitioner's case to the Court's finding of guilt in the Snyder case caused the Court to make certain factual premises which had no basis in the evidence in this case and further caused the Court to totally ignore facets of the evidence that clearly rebut the proposition that a plan was in place as thusly stated by the Court:

> "If this plan was hoped to succeed and it did, it succeeded marveously

well, because both of the people that needed to be distracted were still distracted while Mr. White went down the elevator, out in the yard, into the pickup and off the parking lot."

Appendix, Page 1, 28

The problem first of all with the Court's assumption that this was a plan is that there is no evidence that an attempt was made to distract Mr. Blake who signed Petitioner in that evening to see Mr. White, and the Court conveniently ignores Mr. Blake in its analysis. Appendix, Page 1, 22.

A second major problem with the plan as found by the Court is the matter of timing, how in the world could the alleged conspirators have planned to have the elevator in place at exactly the right time?

A third major problem with the plan as found by the Court was that it offered no

means of controlling the observation of White walking through and out of the building once he reached the first floor thereof.

Only a fool of the first magnitude would formulate a plan with so many potential flaws and only a fool Magna Cum Laude would further formulate a plan which would have the escapee go to Petitioner's house (Appendix, Page 1, 27), take Petitioner's Lincoln Continental automobile (Appendix Page 1, 27), and proceed to North Little Rock Airport.

The obvious problems with the plan lead one to the inescapable conclusion that happenstance and White's desire to escape and not assistance by Petitioner allowed White to get to North Little Rock Airport.

The Court makes much light of its conclusion that Costales, an alleged co-conspirator, was at the North Little Rock Airport. In fact, the only evidence that would point to this was that the fingerprints

of Costales were in the vehicle (Appendix Page 1, 47), which presence could be explained by the fact that Costales went with Petitioner to his brother's (Appendix Page 1, 9).

The analysis of the conflicting evidence must, of course, emphasize one fact, and that is Petitioner called his wife to pick him up (Appendix Page 1, 32). If there was a plan, then Petitioner of necessity would have had to know that the only vehicle at his wife's disposal would be the pickup truck which he had just reported stolen and under no circumstances would he have had her come to the jail in that pickup which, in fact, she did (Appendix Page 1, 33).

Inexorably we are drawn to the conclusion that the Court was biased and could not overcome in its mind the conclusions reached in the prior Snyder

trial, notwithstanding the substantial evidence of Petitioner's innocence.

CONCLUSION

Petitioner respectfully requests that a Writ of Certiorari issue to resolve the conflict between the Court below and this Court as to the standard for determining reversible error when the error is Federal Constitutional error occurring in proceedings which are being collaterally attacked in 2255 proceedings.

Ancillary to resolving the conflict the Petitioner requests not as a reason for granting certiorari, but for the purpose of resolving all issues and preventing furhter that this court review the problem of bias herewith submitted.

Respectfully submitted,

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APPENDIX

A printed Appendix independent of this petition has been filed with the Clerk of this Court and the page references in this petition are to said Appendix

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